Supreme Court, U.S.
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No. 99-1030

In The
SUPREME COURT OF THE UNITED STATES

INDIANAPOLIS, ET AL.,
Petitioners,

v.

JAMES EDMOND, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Are checkpoints at which law enforcement officers briefly stop vehicular traffic, check motorists' licenses and vehicle registrations, look for signs of impairment, and walk narcotics detection dogs around the exterior of each stopped automobile unlawful under the Fourth Amendment?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two important First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed *amicus curiae* briefs in many significant Supreme Court cases, including recent criminal justice cases *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 120 S.Ct. 1595 (2000), *Illinois v. Wardlow*, 120 S.Ct. 673 (2000), and *Florida v. J.L.*,

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1 *Amicus curiae* The Rutherford Institute files this brief by consent of counsel for both parties. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for The Rutherford Institute authored this brief in its entirety, with able assistance from law clerk Margaret W. Ng'ang'a (*J.D.* 2000, Louisiana State Univ. School of Law). No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

120 S.Ct. 1375 (2000), and have also filed a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

The Rutherford Institute is participating in *Indianapolis v. Edmond* as an *amicus* of the Court because it regards the case as a potential watershed in the Court's Fourth Amendment jurisprudence. The Institute recognizes that government at all levels, as well as the public as a whole, has a vested interest in the eradication of drug abuse. Nonetheless, the Court has a corresponding duty to ensure that the rights of private citizens are not run roughshod in violation of their Constitutionally guaranteed rights. In the words of Justice Stewart in *Coolidge v. New Hampshire*:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But values were those of the authors of our fundamental constitutional concepts.

403 U.S. 443, at 455 (1971) (plurality opinion).

In the view of The Rutherford Institute, the issue squarely before the Court is whether it will

now permit the expanding "special needs" exception to the Fourth Amendment's requirement of a warrant and probable cause to completely envelop the rule, by allowing police to engage in routine, suspicionless interrogational stops of citizens for the sole purpose of determining whether they are engaged in criminal conduct. The Court's *amicus* submits that America's history and jurisprudence have never (with the exception of times of war or national emergency) contemplated constitutional approval of a regime in which citizens may be arbitrarily stopped and demanded to "show your papers." The Rutherford Institute respectfully submits that if the City of Indianapolis' drug interdiction program is declared constitutionally permissible by this Court, the nation will inevitably be set on that course.

SUMMARY OF ARGUMENT

The use of canine "sniff" teams in Indianapolis' drug interdiction roadblock program is clearly targeted toward detecting the presence of illegal drugs on the person of the driver and his passengers, or within the compartment of the vehicle. Canine teams are thus proposed for a use that is not in furtherance of detecting *impairment* of a driver, but illegal drug *possession*, unlike the roadblock programs upheld by the Court as justified by interests of highway safety. Because canine police units detect controlled substances in locations not visible to the eyes of human officers, or within their olfactory capability, they must be deemed to be "searches" of passengers and vehicle

interiors subject to the Fourth Amendment's "reasonableness" requirement.

Checkpoint enforcement of a state's anti-drug laws is a criminal rather that a civil function of the police power. Thus the program in question must be characterized as a "general criminal law enforcement" program rather than a "primarily civil program for the protection of health, safety and the integrity or our borders." The checkpoints implemented by the City of Indianapolis were primarily set up to intercept narcotics traffickers in transit and not impaired drug users. The netting of intoxicated or impaired drivers, or drivers in violation of licensing regulations, is merely an ancillary benefit of the program. For these reasons, Petitioner's interdiction program does not involve a reasonable administrative search, and therefore the rationale of *Michigan v. Sitz* cannot be extended so far.

ARGUMENT

I. A CANINE SNIFF SEARCH OF A PERSONAL VEHICLE AND THE PERSONS AND CONTENTS THEREIN IS A "SEARCH" UNDER THE FOURTH AMENDMENT, AND MUST BE ASSESSED UNDER THE COURT'S STANDARD OF "REASONABLENESS UNDER THE CIRCUMSTANCES."

The subjection of persons and property to suspicionless canine searches is of highly doubtful constitutional validity. The Supreme Court has

addressed the constitutionality of canine sniff searches only once, nearly twenty years ago, in *United States v. Place*, 462 U.S. 696 (1983), and then only in dictum. *Place* involved an individualized sniff of an air traveler's luggage, which was seized and held for ninety minutes. 462 U.S. at 699. In holding that the detention unreasonably exceeded the scope of a permissible stop under *Terry v. Ohio*, 392 U.S. 1 (1968), the Court suggested in an aside that the canine sniff of the defendant's luggage was so limited in nature that it could not be deemed a "search" for Fourth Amendment purposes. *Place*, 462 U.S. at 707. Three members of the Court objected to the inclusion of this view by the majority on the ground that the issue had not been briefed or argued. *Id.*

Since *Place*, the Court has not readdressed this issue, nor applied or extended the dictum of *Place* beyond canine sniffs of luggage at airports based on individualized suspicion. The circuit courts of appeal, however, have struggled with the nature of canine sniffs in a variety of other contexts. *Compare United States v. Thomas*, 757 F.2d 1359 (2nd Cir. 1985), *cert. den.*, 474 U.S. 819 (1985) (canine sniffs are searches, requiring balancing against legitimate expectation of privacy); *United States v. Liberto*, 660 F.Supp. 889 (D.D.C. 1987), *aff'd without op.*, 838 F.2d 571 (D.C. Cir. 1988) (dog sniff is a "search" but presumptively reasonable); with *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995) (narrowly applying *Place* dictum to permit vehicle roadblocks established for the separate lawful purpose of checking driver's licenses and

registrations could include canine sniffs of exterior of stopped vehicles); *United States v. Dovali-Avila*, 895 F.2d 206 (5th Cir. 1990) (canine sniffs are not searches); *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989) (same); *United States v. Beale*, 736 F.2d 1289 (9th Cir. 1984) (same).

The Second Circuit and the District of Columbia Circuit have squarely held that dog sniffs are "searches." *See* cases cited *supra*. The Second Circuit has refused to expand the *Place* dictum to sniffs on private property, holding that the defendants possessed a reasonable expectation of privacy in their closed residence that was violated by the warrantless sniff search. *United States v. Thomas*, 757 F.2d at 1366-67. In the D.C. Circuit, a warrantless sniff of a train passenger compartment was subjected to a Fourth Amendment balancing analysis, and the search upheld in view of the passenger's conduct that did not evidence an expectation of privacy in the compartment. *Liberto*, 660 F.Supp. at 891.

However, the Eleventh Circuit rejected the view that the Fourth Amendment is implicated by a suspicionless sniff search in *Merrett v. Moore*, 58 F.3d at 1553 n. 11, holding that "[t]he use of dogs on the exterior of ... cars constitutes no search." The Fifth, Ninth and Tenth Circuits have held likewise. *See* cases cited *supra*. The split in authority between the Second and D.C. Circuits, and the Eleventh and several other circuits, over the Fourth Amendment status of dog sniff searches warrants a revisitation by the Court of the *Place*

dictum and its application to situations outside the limited context of airports and public transportation.

The Court's *amicus* submits that it may be impracticable to impose a uniform rule for the Fourth Amendment status of canine searches in all circumstances, but at least where, as here, the use of canine units to detect drugs on persons as well as their vehicles absent individualized suspicion warrants analysis of the constitutional reasonableness of the program under the "totality of the circumstances" approach. For example, the Ninth Circuit recently ruled that a suspicionless canine sniff search of the student body of a public school constituted a Fourth Amendment "search," and that such a search was "unreasonable" because, in the absence of a record of a drug problem or crisis at the school, the government's important interest in deterring student drug use would not have been placed in jeopardy by requiring individualized suspicion. *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1268 (9th Cir. 1999), citing *Chandler v. Miller*, 520 U.S. 305, 314 (1997). Similarly, the Fifth Circuit held in *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982), that a school policy of canine drug sniffs of students was an unconstitutional "search" absent individualized suspicion, but that the sniffing of vehicles and lockers was not a "search" under the Fourth Amendment.

II. ON BALANCE, THE LEVEL OF INTRUSION THAT PETITIONER'S POLICE CHECKPOINTS IMPOSE IS NOT WARRANTED BY THE GOVERNMENTAL INTEREST PRESENTED HERE, HOWEVER COMPELLING IT MAY BE.

The Court has frequently observed that the Fourth Amendment does not proscribe all contact between the police and citizens, but is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). This Court has stressed that governmental intrusions on citizen privacy "should be judged by the standard of reasonableness under all the circumstances." *O'Connor v. Ortega*, 480 U.S. 709, 725-726 (1987). This standard requires a two-part inquiry: 1) Whether the search was "justified at its inception based upon reasonable, individualized grounds for suspecting the search will turn up evidence of misconduct," 480 U.S. at 726, citing *Terry v. Ohio*, 392 U.S. at 20; and 2) Whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place," 480 U.S. at 726, citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The Rutherford Institute contends that the Petitioner's police detentions conducted in this case were unreasonable both at inception and in the scope of their interference with the right of privacy of the citizens of Indianapolis. The actions of Petitioner's police force raise the specter of wholesale law enforcement campaigns involving mass highway searches by canine units and

seizures of persons and personal property absent the protections of a warrant or individualized suspicion.

The Rutherford Institute submits that the Seventh Circuit properly applied the "special needs" analysis to Petitioner's roadblock program. As the Court of Appeals Court noted, it is difficult to quantify the benefits and costs of most law enforcement programs, and therefore permitting the program approach may result in deep inroads into personal privacy. *Palmer v. Goldsmith*, 183 F.3d 659, 662 (7th Cir. 1999). For this reason, courts do not typically assess reasonableness at the program level in cases such as this, where the search is related to general criminal law enforcement. *See Whren v. United States*, 517 U.S. 806 at 810 (1996). The Rutherford Institute suggests that this is such a program and not primarily a civil regulatory program for the protection of health, safety and the protection of the integrity of our borders. *E.g.*, *Michigan v. Tyler*, 436 U.S. 499, 504-06 (1978); *Martinez-Fuerte, supra*; *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574 (7th Cir. 1999). While there are cases wherein the police and other government officials have been allowed to impose on civilians in a manner similar to that perpetrated by the City of Indianapolis, those cases made it clear that allowing the imposition ultimately depended upon the powers of the Federal government over foreign relations. *See United States v. Martinez-Fuerte*, 428 U.S. 543; *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *United*

States v. Ramsey, 431 U.S. 606 (1977); and *United States v. Johnson*, 991 F.2d 1287, 1290-92 (7th Cir. 1993). No such allowance has been made to the federal or State governments, or any of their administrative arms, with regard to the rights of American citizens within the nation's borders in non-immigration related matters.

The Petitioner's drug interdiction stops also cannot be characterized as "reasonable" in the scope of their intrusion on citizen privacy. Indianapolis' actions flout the central rule of *Terry* stop jurisprudence, that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Mendenhall*, 446 U.S. 554 (1980); *Florida v. Royer*, 460 U.S. 491, 500 (1983). "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." 392 U.S. at 28. The investigative methods employed pursuant to a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500.

Had the balancing test espoused by the Court in *Brown v. Texas*, 443 U.S. 47 (1979) been applied by the Seventh Circuit instead of the special needs analysis, Petitioner's drug interdiction program would nonetheless have been constitutionally

indefensible. In *Brown*, the court stated that "in the absence of any basis for suspecting [the defendant] of misconduct, the balance between the public interest and [defendant's] right to personal security and privacy tilts in favor of freedom from police interference." *Id.* at 50-53.

The City claims an interest in the detection and interception of drug trafficking. The costs to the motorists of Indiana are certainly substantial, in view of the time spent at the checkpoint, the inconvenience and the apprehension and invasion of privacy engendered. Notably, although the 'hit' rate was high at the checkpoints, the overall haul by the police of narcotic offenders was not high enough to justify the cost to the other motorists. Drug traffickers, who have historically displayed an ingenious capacity for creative evasion, are likely to wise up to the police program and devise new ways to circumvent it. This will leave innocent motorists stranded at checkpoints while the targets of the program avoid them altogether.

In reviewing police conduct in this area, the burden is upon the State to demonstrate the reasonableness of the scope and duration of the search in relation to its legitimate purpose. *Florida v. Royer,* 460 U.S. at 500. This view is consistent with general Fourth Amendment safeguards laid down by the Court in other contexts. Even a search incident to a lawful arrest must be limited in scope to that which is justified by the purposes served by that exception to the warrant requirement. 460 U.S. at 498. Likewise, the "hot pursuit" exception

to the warrant requirement permits the warrant requirement to be abandoned in the context of probable cause to arrest a fleeing suspect, but not reasonable suspicion to interrogate. *Johnson v. United States*, 333 U.S. 10 (1948). In Justice Brennan's words, the rule propounded by Petitioner would permit "law enforcement officers [to] release a trained cocaine-sensitive dog ... to roam the streets at random, alerting the officers to people carrying cocaine." *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting). The searches proposed by Petitioner are characteristic of "an extended hue and cry in and about [the] public streets" created by police, which the Supreme Court has condemned where no warrant or probable cause exists. *United States v. Santana*, 427 U.S. 38, 43 (1976).

CONCLUSION

The Fourth Amendment serves to protect all citizens, regardless of the good intentions of police officials or the relative efficacy of the law enforcement program in question. As Justice Scalia wrote for the Court in *Arizona v. Hicks*, 480 U.S. 321, 329 (1987), "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." Like the rains from heaven, constitutional rights fall on the just and the unjust. *See United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992). While the drug abuse crisis weighs heavily on the shoulders of law enforcement officers and legislators, the constitutional right to

freedom from arbitrary and groundless police stops and searches cannot be allowed to become a casualty of the war on drugs.

The Court's *amicus* respectfully submits that for the reasons set forth herein, the judgment of the Court of Appeals should be affirmed.

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